No. 79-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR STATE OF NEW YORK AS AMICUS CURIAE

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The Attorney General of the State of New York is submitting this brief on behalf of the State of New York pursuant to Supreme Court Rule 36(4).

Jurisdiction was noted on October 5, 1980.

Question Presented

Is it constitutional for California to levy a retaliatory tax in excess of the normal tax against companies domiciled elsewhere, because the state of their domicile taxes insurance companies at a rate higher than California does?

INTEREST OF NEW YORK STATE

The question presented is of great interest to New York State because of the effect of similar retaliatory taxes on insurance companies domiciled within the State. A retaliatory tax is a tax imposed by a state against some foreign insurance companies at a higher rate than that imposed on domestic insurance companies. As an example of how such a tax works, suppose state "A" taxes insurance companies at 2% and state "B" taxes them at 5%. Under a retaliatory tax law, state "A" would surcharge a state "B"-domiciled insurance company an additional 3%. Since most retaliatory tax laws provide that the foreign insurance company shall be taxed at the higher rate used by its home state, it is possible for a foreign insurance company to be taxed at a rate not only higher than domestic companies, but also higher than some foreign companies domiciled in other foreign states.

Because most states have such a retaliatory tax against non-domiciled insurance companies, New York State has been forced to retain a similar retaliatory tax (NY Insurance Law § 61). Retaliatory taxes result in insurance companies domiciled in New York State paying more to do business in other states and has had a detrimental effect on their business operations.

In 1973, New York attempted to resolve the retaliatory tax problem which plagued its insurance industry (L 1973, ch 459). In attempting at a compromise the Legislature amended section 61 of its Insurance Law by adding a paragraph 4, which is still in effect and reads as follows:

> "4. The provisions of this section shall not apply to insurance companies organized or domiciled in a state or country, the laws of which do not impose retaliatory taxes or other charges or which grant, on a reciprocal basis, exemptions therefrom to insurance companies organized or domiciled in this state."

In the supporting memorandum to Governor Rockefeller Norman Gallman, the then Commissioner of the Department of Taxation and Finance, stated that subdivision 4 is intended to be a step in eliminating retaliatory taxation in the taxation of insurance companies by states. He also stated:

> "The addition of subdivision 4 by this bill is an attempt to eliminate retaliation among states and will be beneficial to New York. But, this will only be fully effective if similar provisions are adopted by all states imposing retaliatory provisions. (At this time there are 46 states which have retaliatory provisions.) I am informed that only Massachusetts has adopted a similar provision in an attempt to end retaliatory taxation by other states on Massachusetts' insurance companies. Thus, the immediate effect of this bill will be to end retaliation against New York companies doing business in Massachusetts."*

It was enacted in the hope that other states would follow suit and enact similar legislation providing for reciprocal exemption from the retaliatory tax. None have followed suit.

New York State is the domicile of 164 property insurance companies, 70 life insurance companies, 8 accident and health insurance companies, and 8 title insurance companies. Most of these companies do business outside New York as well as within the State and are adversely affected by the retaliatory tax. It is estimated that this adverse effect has been a prime factor in causing 19 insurance companies to move their domiciles from New York State to other states.** The assets of these 19 companies amounted to $6,735,659,000; their liabilities amounted to $5,326,105,000; their capital amounted to $156,864,000, and they had a surplus of $1,257,548,000. (Attached hereto, as Appendix A, is a chart prepared from information on file in the office of the New York State Insurance Department.)

Thus, when New York State companies are taxed at a higher rate, it adversely affects their ability to compete with other insurance companies, injuring the companies and eventually injuring the State. This is demonstrated by the fact that 19 insurance companies have left the State. The removal of the 19 insurance companies from New York resulted in the loss of countless jobs and related services and adversely affected its economy and the welfare of its citizens.

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* See Mass. Gen. Laws, Ch 63, § 24A.

** As documented by correspondence files of the New York Insurance Department.

HISTORY

For many years insurance companies were held not to be engaged in commerce and therefore not subject to United States regulation (see *Paul v Virginia*, 75 US 168, 183 [1868]). However, in *United States v Southeastern Underwriters Ass'n.*, 322 US 533 (1944), this Court determined that insurance was commerce and subject to the Sherman Anti-Trust Act (15 USC §§ 1, & 2). To mitigate the effects of *Southeastern Underwriters* on the states' ability to impose taxes or fees on the privilege of insurance companies to do business within those states, Congress quickly enacted the McCarron-Ferguson Act, 59 Stat 33 (1945), 15 USC §§ 1011-1013, to permit such exactions. It also made the Sherman Act, the Clayton Act and the Robinson-Patman Act inapplicable to the insurance business. Nowhere did it authorize a retaliatory tax.

The question of the constitutionality of retaliatory taxes was considered shortly after the passage of the McCarron-Ferguson Act. In *Prudential Ins. Co. v Benjamin*, 328 US 408 (1946), it was held that what might otherwise be an unconstitutional discriminatory tax was legitimized because of the McCarron Act. *Benjamin*, however, implied that where "a clear and gross evil" is created by a retaliatory tax, it would be illegal (p 436).

ARGUMENT

THE McCARRON-FERGUSON ACT DID NOT AUTHORIZE AND COULD NOT AUTHORIZE TAX STATUTES WHICH VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

(1)

New York State is relying on the briefs presented by the appellant here on the question of the unconstitutionality of a retaliatory tax as violating both the Commerce Clause and the Fourteenth Amendment to the Constitution and on the proposition that the McCarron-Ferguson Act could not empower states to enact such a tax.

The McCarron-Ferguson Act only restored the power of a state to levy taxes to support its government. Thus, in *State Board of Insurance v Todd Shipyards Corp.*, 370 US 451 (1962), a tax on the insurance of properties located in Texas owned by the defendant, a New York corporation, when the insurer was not licensed in Texas and when the premiums were paid in New York, was declared unconstitutional. It was held that the McCarron-Ferguson Act could not justify such a tax. The fact that insurance companies were involved did not permit violation of either the Commerce Clause or of the Fourteenth Amendment by states.

Before *Southeastern Underwriters* and McCarron-Ferguson this Court in *Hanover Fire Ins. Co. v Harding*, 272 US 494 (1926) had held that when a foreign insurance company obtained a license to do business in a state*, the state could not discriminatorily tax it. Thus a foreign insurance company could not be required to pay a higher tax on its personal property than that required from a domestic insurance company. Similar holdings are *Southern Railway Co. v Greene*, 216 US 400 (1910); *Bethlehem Motors Co. v Flynt*, 256 US 421 (1921); *Connecticut Gen. Life Ins. Co. v Johnson*, 303 US 77 (1938).

It is, thus, clear that a tax imposed on a foreign corporation licensed to do business in a state may not be discriminatory.

(2)

The argument that a state might reverse the adverse effects of other states' retaliatory taxes by reducing the taxes it levies on insurance companies to the lowest prevailing rates, and thus not subject its domestic insurance companies to retaliatory taxes, does not relieve the unconstitutionality of retaliatory taxation. In *Austin v New Hampshire, et al.*, 420 US 656 (1975), this Court said (pp 666-667):

> "[W]e do not think the possibility that Maine could shield its residents from New Hampshire's tax cures

* The appellant herein states that it has had an indefinite license to do business in California since 1956 (Brief of United States in Support of Noting Probable Jurisdiction [p 8]).

> the constitutional defect of the discrimination in that tax. In fact, it compounds it. For New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it."

Reducing tax rates to the lowest level is not required of a state to shield its industry from burdensome taxes imposed by other states. Economic threats should not be used on a state by other states to compel legislative action. A state should be at liberty to pursue taxation for the purpose of producing revenue without threat of retaliation against its citizens.

(3)

More than thirty-five years have passed since the enactment of McCarron-Ferguson and more than thirty-four years have passed since this Court considered *Prudential Ins. Co. v Benjamin, supra.* The serious consequences to the insurance business and to the states in which the insurance companies are domiciled resulting from these retaliatory taxes can now be seen. It is time that the McCarron-Ferguson Act be interpreted so as not to allow discriminatory action by states. It follows, therefore, that the California tax law, which is discriminatory, should be declared unconstitutional.

CONCLUSION

THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, AND DECLARE THAT THE CALIFORNIA INSURANCE CODE, § 685, IS UNCONSTITUTIONAL.

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November 20, 1980

Respectfully submitted,

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APPENDIX A

TABLE OF INSURANCE COMPANIES WHICH HAVE LEFT NEW YORK STATE

Company	Year Moved	New Domicile
Home Insurance Co.	1973	New Hampshire
Great American	1976	Ohio
National Reins Corp.	1977	Delaware
Puritan Insurance Co.	1977	Connecticut
London Guarantee	1977	Delaware
Glens Falls	1977	Delaware
Niagara Fire	1977	Delaware
Continental	1977	New Hampshire
Buffalo Reins	1977	New Hampshire
Phoenix Assurance	1977	New Hampshire
Fidelity & Casualty	1977	New Hampshire
American Reins	1978	Delaware
First International Reins	1978	Delaware
North Star Reins	1978	Delaware
Hudson	1978	Delaware
Skandia	1978	Delaware
American & Foreign	1980	Delaware
Globe Indemnity	1980	Delaware
Royal Indemnity	1980	Delaware
Total		

Assets	Liabilities	Capital	Surplus
1,319,479,000	1,033,171,000	20,973,000	265,334,000
902,999,000	699,274,000	15,440,000	188,284,000
193,962,000	147,011,000	5,000,000	41,951,000
49,276,000	29,561,000	2,500,000	17,246,000
67,076,000	52,450,000	1,600,000	13,027,000
68,557,000	52,847,000	2,000,000	13,709,000
67,325,000	53,392,000	10,000,000	3,934,000
969,195,000	792,800,000	53,566,000	122,829,000
78,060,000	61,085,000	3,200,000	13,775,000
156,996,000	122,435,000	5,000,000	29,561,000
295,566,000	237,918,000	10,000,000	47,647,000
1,104,291,000	943,497,000	8,235,000	152,560,000
22,563,000	14,775,000	2,350,000	5,438,000
148,911,000	100,603,000	3,000,000	45,308,000
69,800,000	56,232,000	2,500,000	11,068,000
321,204,000	252,177,000	2,500,000	66,526,000
127,647,000	101,477,000	2,600,000	24,000,000
458,574,000	345,048,000	3,900,000	113,526,000
312,178,000	230,352,000	2,500,000	81,825,000
6,735,659,000	5,326,105,000	156,864,000	1,257,548,000